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In The
Supreme Court of the United States

GLORIA ALLRED and ALLRED, MAROKO & GOLDBERG,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF CONTRA COSTA,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA, and DEFENDANT SCOTT EDGAR DYLESKI,

Real Parties in Interest.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This case squarely presents an issue of profound importance under the First Amendment that has never been addressed by this Court and which splits the Circuits and the state courts: when may trial courts impose prior restraints on lawyers' speech about pending cases?

On countless occasions, this Court has stressed that "'[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317 (1980) (emphasis in original; quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). This Court and its Justices have often repeated, in many distinct contexts, their abhorrence of prior restraints on speech. *See, e.g., Nebraska Press Ass'n*, 427 U.S. 556, 589 (1976) (describing the "deep-seated American hostility to prior restraints"); *New York Times Co. v. United States*, 403 U.S. 713-14 (1971) (declaring strong presumption against prior restraints); *Bantam, supra*, 372 U.S. at 70-71 (listing cases striking down prior restraints); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 706 (1931) (rejecting injunction on future publication of newspaper despite publisher's previous dissemination of defamatory material).

Notwithstanding this consistent disapproval of court orders preventing speech, lower courts across the country are now routinely approving prior restraints in high profile cases in the form of gag orders on speech by lawyers and trial participants. *See State ex rel. Missoulian v. Montana Twenty-First Judicial Dist. Court*, 933 P.2d 829, 845 (Mont. 1997) (Nelson, J., dissenting) ("there has been a proliferation of orders restraining trial participants as a means of indirectly restraining the press. . . . Indeed, this trend has accelerated because of highly publicized cases."); C. Thomas Dienes,

Trial Participants in the Newsgathering Process, 34 U. RICH. L. REV. 1107, 1109 (2001) ("there has been an increasing use of broad, sweeping judicial gag orders on trial participants, including lawyers"); Douglas E. Mirell, *Gag Orders & Attorney Discipline Rules: Why Not Base the Former Upon the Latter?*, 17 LOY. L.A. ENT. L. REV. 353, 353 (1997) ("With increasing frequency, judges throughout the United States are imposing (or threatening to impose) ever-more Draconian forms of prior restraints upon the out-of-court statements of attorneys and other trial participants.")

This proliferation of prior restraints on the speech of attorneys and trial participants has occurred because this Court has never decided a case concerning their constitutionality. As the Texas Supreme Court explained: "Neither *Nebraska Press* nor any other ruling of the United States Supreme Court has specifically considered such an order. Indeed, there is a confusing split of federal authority on this matter. The end result has been an increase in the number of gag orders on parties to ongoing litigation." *Davenport v. Garcia*, 834 S.W.2d 4, 11 n.20 (Tex. 1992).

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), this Court considered when lawyers may be punished *after* their speech. No gag order was placed on Gentile's speech and none was considered by this Court, No Supreme Court case ever has decided the standard to be used in determining whether a gag order may be imposed on the speech of lawyers and trial participants.

In the absence of guidance from this Court, three conflicting approaches have emerged, with some circuits and states following each. As a federal district court recently explained: "A three-way circuit split exists with respect to . . . the threshold standard for imposing a prior restraint." *United States v. Carmichael*, 326 F.Supp.2d

1267, 1293 (D.Ala. 2004). As explained below, some Circuits and states allow prior restraints, as did the trial court in this case, upon finding that there is a reasonable likelihood of prejudicing an adjudicatory proceeding. Appendix to Petition for Certiorari ("App.") at 7. Other Circuits and states require that there be a substantial likelihood of prejudice. Still other Circuits and states require that there be a showing of a "clear and present danger" of prejudice and apply strict scrutiny.

Contrary to the State's assertion, this is not just a "difference in semantics." State of California's Brief in Opposition to Petition for Certiorari ("State Br. Opp.") at 5. This is essentially a split over whether the test for prior restraints on lawyers and trial participants should be rational basis review, intermediate scrutiny, or strict scrutiny. It is essential that this Court grant review to resolve this issue of great national importance.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE, WHICH HAS DIVIDED THE FEDERAL AND STATE COURTS, CONCERNING WHETHER AND WHEN GAG ORDERS MAY BE IMPOSED ON ATTORNEYS PREVENTING THEIR SPEECH ABOUT PENDING CASES.

A. The Circuits and State Courts Are Split As To The Appropriate Test To Apply In Determining Whether To Impose A Prior Restraint On The Speech Of Lawyers And Trial Participants.

As explained in the Petition for Writ of Certiorari, three distinct, conflicting approaches have emerged among the federal circuits and the states as to when gag orders may be placed on lawyers and trial participants. The

Sixth, Seventh, and Ninth Circuits and some states allow gag orders on lawyers only if there is a "clear and present danger" to providing a fair adjudicatory proceeding and essentially require that strict scrutiny be met. *United States v. Ford*, 830 F.2d 596, 600 (6th Cir. 1987); *Levine v. United States*, 764 F.2d 590, 595 (9th Cir. 1985); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975); *Twohig v. Blackmer*, 121 N.M. 746, 749 (N.M. 1996); *Kemner v. Monsanto Co.*, 112 Ill.2d 223, 244 (Ill. 1986).

In contrast, the Second, Fourth, and Tenth Circuits and some states allow gag orders if there is a "reasonable likelihood" of prejudice. *In re Morrissey*, 168 F.3d 134, 140 (4th Cir. 1999); *In re Application of Dow Jones & Co.*, 842 F.2d 603, 610 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988); *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969); *State v. Bassett*, 128 Wash.2d 612, 616 (1996); *National Broadcasting Co. v. Cooperman*, 116 A.D.2d 287, 292 (N.Y. App. Div. 1986). This is the approach taken by the trial court in this case in approving the gag order on the speech of the lawyers and trial participants. App. at 7.

Yet a third approach, focusing on whether there is a "substantial likelihood" of prejudice, is followed in the Third and Fifth Circuits. *United States v. Scarfo*, 263 F.3d 80, 94 (3d Cir. 2001); *United States v. Brown*, 218 F.3d 415, 425 (5th Cir. 2000).

It is hard to imagine a clearer split among the Circuits and states than this. Respondent State of California makes two responses. First, it says that this difference is "mere semantics." St. Br. Opp. at 5. But as many of these lower court decisions have recognized, there is an enormous difference between a "reasonable likelihood" test, a "substantial likelihood" test, and a "clear and present danger" test. *See, e.g., Chicago Council of Lawyers v. Bauer*, 522 F.2d at

249 (reasonable likelihood standard is not sufficient to meet the requirements of the First Amendment and clear and present danger standard should be used); *United States v. Brown*, 218 F.3d at 428 ("the 'clear and present danger' test cannot be the appropriate standard by which we evaluate gag orders imposed on trial participants. Instead, the standard must require a lesser showing of potential prejudice.")

Second, the State contends that there is not a conflict among the lower courts since this Court's decision in *Gentile*. This is just false. *Gentile* involved the standard to be applied when an attorney may be disciplined *after* speaking. It did not involve and did not consider the appropriate standard for prior restraints on speech by attorneys and trial participants. Thus, it did nothing to resolve the split in authority and the use of differing approaches continues. For example, the Fifth Circuit, a decade after *Gentile*, noted "[o]ur sister circuits have not reached a consensus on this question" of when gag orders are constitutionally permissible. *United States v. Brown*, 218 F.3d at 425. Just two years ago, a federal district court expressed uncertainty over the test because there is a "three-way circuit split as to . . . the threshold standard for imposing a prior restraint." *United States v. Carmichael*, at 1293. In fact, there are cases using each of the three approaches in the years since *Gentile*. *See, e.g., Twohig v. Blackmer*, 121 N.M. 746, 749 (N.M. 1996) (using the "clear and present danger" test); *In re Morrissey*, 168 F.3d 134, 140 (4th Cir. 1999); *State v. Bassett*, 128 Wash.2d 612, 616 (1996) (using "reasonable likelihood" test); *United States v. Scarfo*, 263 F.3d 80, 94 (3d Cir. 2001); *United States v. Brown*, 218 F.3d 415,425 (5th Cir. 2000) (using "substantial likelihood" test).

This Court needs to grant review to resolve this split and provide desperately needed guidance as to when gag orders on lawyers and trial participants are permissible.

B. This Case Provides An Ideal Vehicle For This Court To Decide This Issue Of National Importance.

1. The issue of the appropriate standard for gag orders on lawyers and trial participants is clearly and directly presented.

This case presents an ideal opportunity to resolve this conflict among the circuit and state courts. The gag order on the attorneys and trial participants in this case is typical of those entered in high profile cases around the country. John Stevenson, *Attorneys Want Gag Order Lifted; Lacrosse Players' Lawyers Say 'Court of Public Opinion' Is Necessary for Justice*, HERALD-SUN (Durham, N.C.), July 22, 2006, at A1 (describing gag order in prosecution of Duke Lacrosse players); Patti Bond, *Scrushy Trial Unlikely To Be Dull; HealthSouth Founder Known As a Showman*, ATLANTA J.-CONST., Jan. 16, 2005, at D1 (citing a gag order in the trial of HealthSouth founder and former Chief Executive Officer, Richard Scrushy); Jeff Benedict & Steve Henson, *The Case Against Kobe Bryant Unraveled in a Mock Trial*, L.A. TIMES, Nov. 6, 2004, at A1 (describing the judge's order in the Kobe Bryant case as a "sweeping gag order"); *Judge Issues Gag Order in Peterson Case*, CHI. TRIB., June 13, 2003, at 16.

In fact, this case presents a particularly important vehicle for deciding this issue. The attorney in this case, Ms. Allred, was representing a potential witness and not a party. Unlike counsel for the parties, Ms. Allred is not privy to any inside information about the case or its evidence, apart from her client's potential testimony and she already had agreed not to comment on that.

Respondents focus on the fact that Ms. Allred at times also serves as a media commentator. St. Opp. Br. at 10; Dyleski Opposition to Petition for a Writ of Certiorari ("Dyleski Opp. Br.") at 12-14. But surely Ms. Allred does not have less First Amendment rights just because she exercises her right to freedom of speech.

Also, the prior restraint on Ms. Allred's speech kept her from discussing misconduct by police and prosecutors in the way in which her client was treated. Speech critical of government misconduct "has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990). But any public statement by Ms. Allred which criticized the actions of government officials and accused them of misconduct with respect to Ms. Allred's client, a potential witness, would be a violation of the Protective Order.

2. Although the trial in this case has ended, the case is not moot because this is a classic "wrong capable of repetition, but evading review."

The State argues that certiorari should be denied because the case is moot since the trial has ended in a verdict and the gag order has been lifted. St. Opp. Br. at 8.* This case, though, presents a classic "wrong capable of repetition, but evading review" precisely because such gag orders are always of limited duration and inevitably expire

* Respondent Dyleski also argues that Ms. Allred lacks "standing" because the trial court applied the standard she urges. Dyleski Opp. Br. at 9-10. However, Ms. Allred unquestionably has standing because she was injured in that her speech was enjoined. Moreover, as explained above, the trial court did not use the standard urged by Ms. Allred; it used a reasonable likelihood test which is not nearly protective enough of speech to meet First Amendment muster.

before this Court has the opportunity for review. *See, e.g., Southern Pac. Terminal Co. v. ICC*, 219 U.S. 408, 514-15 (1911) (allowing a challenge to an Interstate Commerce Commission order that had expired because the Court concluded that consideration of such orders should not be defeated, "as they might be, . . . by short term orders, capable of repetition, yet evading review.")

In fact, this Court frequently has reviewed judicial orders limiting speech about pending cases after the trials have ended on the grounds that such orders are wrongs capable of repetition but evading review. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. at 546-47 (allowing review of judge's order imposing gag order on press preventing pretrial reporting even though the order had ended); *see also, Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602 (1982) (allowing review of exclusion from trial of victim of sex crime who was under age 18 after trial was completed); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377 (1979) (allowing review of exclusion from pretrial hearing after its completion). As the Court explained in *Nebraska Press*, in deciding the constitutionality of a gag order imposed on the press even though the trial was over: "Yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, . . . since these orders are by nature short-lived. We therefore conclude that this case is not moot, and proceed to the merits." *Nebraska Press Ass'n*, 427 U.S. at 547.

The issue of gag orders on lawyers and trial participants is likely to occur over and over again, but always evade review because the trials inevitably will be over before the Supreme Court can hear the case. Moreover, as Respondents emphasize, Petitioner Gloria Allred is a

frequent media commentator who often represents witnesses in high profile cases. This makes it very likely that she personally will face this issue again.

3. The gag order in this case is unconstitutional.

Both of the briefs in opposition to certiorari focus on defending the gag order in this case. But both briefs ignore key reasons why the gag order is clearly unconstitutional. Never in American history has this Court upheld a court order preventing speech. This prior restraint is especially suspect because it prevents speech about court proceedings and the conduct of government officers. This Court has recognized that "[i]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

The trial court in this case imposed a gag order on a finding that there was a "reasonable likelihood" that the pretrial publicity would prevent a fair trial. App. at 7. It is impossible to reconcile a "reasonable likelihood" standard with this Court's consistent statement of a strong presumption against prior restraints. Moreover, this Court's decision in *Gentile* rather than supporting the gag order, as Dyleski and the State claim, shows why the trial court erred. In *Gentile*, this Court held that a lawyer may be disciplined after speaking if there was a showing that the speech had a "substantial likelihood" of materially prejudicing an adjudicatory proceeding. The standard for a prior restraint surely must be at least as stringent, if not more so, than that used for after-speech punishment. It is well established that the First Amendment "accords greater protection against prior restraints than it does against subsequent punishment for a

particular speech[.]" *Nebraska Press Ass'n*, 427 U.S. at 589 (Brennan, J., concurring).

Also, after *Gentile*, Ms. Allred, and all lawyers, know that their speech can be punished if it is prejudicial. The trial court here made no findings that the prospect of such discipline was not sufficient and why a broad prior restraint was needed.

Respondents emphasize the publicity surrounding the trial. *See, e.g.*, State Opp. Br. at 8-10. But this Court has been clear that pretrial publicity, even extensive pretrial publicity, does not automatically risk undermining a fair trial. This Court stated that "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Nebraska Press Ass'n*, 427 U.S. at 565. The trial court in this case made no findings as to why Ms. Allred's speech was likely to present a clear and present danger, let alone a substantial likelihood or even a reasonable likelihood of preventing a fair trial.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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